Office-Supreme Court, U.S.
FILED
DEC 31 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 718

GROVE PRESS, INC., a New York corporation,
Petitioner,

vs.

RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, and WHELAN DRUG CO., INC., a Florida corporation, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

EDWARD DE GRAZIA
1001 Connecticut Ave., N.W.
Washington 36, D. C.

RICHARD YALE FEDER
100 Biscayne Blvd. South
Miami 32, Florida

TOBIAS SIMON
c/o Fla. Civil Liberties Union
223 S.E. 1st Street
Miami 32, Florida

Attorneys For Petitioner

IRMA ROBBINS FEDER
LAURENCE I. HEWES, III
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Statute Involved	4
Statement of the Case	5
Reasons for Granting the Writ	8
Conclusion	18
Appendix A—	
Opinion of Florida District Court of Appeal	1a
Opinion of Florida District Court of Appeal (transferring cause to Florida Supreme Court)	4a
Order of Florida District Court of Appeal (transferring cause to Florida Supreme Court)	7a
Order of Florida Supreme Court (transferring cause back)	8a
Appendix B—	
Final Decree of trial court	9a
Appendix C—	
Florida Statute 847.011	12a

TABLE OF AUTHORITIES CITED

CASES:

Arnebergh v. Zeitlin ... U.S. ..., No. 584, October Term, 1963, certiorari denied, Dec. 16, 1963	10
Attorney General v. "Tropic of Cancer" 184 N.E.2d 328	11
Bantam Books v. Sullivan 372 U.S. 58	12, 16
Grove Press v. Christenberry, 276 F.2d 433	17
Jacobellis v. Ohio 371 U.S. 808	9
Kingsley Books, Inc. v. Brown 354 U.S. 436	9
Manual Enterprises v. Day 370 U.S. 478	10, 12, 13, 16

Page

Marcus v. Search Warrants of Property, etc. 367 U.S. 717 ..... 12, 16
McCauley v. Tropic of Cancer 121 N.W.2d 545 11
New Jersey v. Hudson County News Co., et al. (decided December 16, 1963) 15, 17
People v. Fritch 13 N.Y.2d 119, 192 N.E.2d 713 ..... 10, 17
People v. Richmond County News, Inc. 9 N.Y.2d 578, 175 N.E.2d 681 17
Roth v. United States, 354 U.S. 476 ..... 3, 8, 9, 10, 11, 12, 13, 15, 16
Smith v. California 361 U.S. 147 ..... 12, 16
Smith v. California 373 U.S. 901 8-9
Smith v. California ... U.S. ..., No. 72, October Term, 1963, Decided December 16, 1963 ..... 12, 16
Sunshine Book Co. v. Summerfield 355 U.S. 372 .... 12, 16
Times Film Corp. v. Chicago 355 U.S. 35 ..... 12, 16
Zeitlin v. Arnebergh 31 Cal. Reptr. 800, 383 P.2d 152 ..... 6, 11, 12, 13-14

Constitutional and Statutory Provisions:

United States Constitution,
First Amendment 3, 4, 7, 8, 9-10, 14, 15, 16
Fourteenth Amendment 3, 4, 7, 8, 9-10, 14, 15, 16
Title 28, U. S. C.,
Section 1257(3) 3, 8
Florida Constitution,
Article 5, Section 4(2) 2, 3
Article 5, Section 5(3) 2
Florida Statute 847.011 ..... 2, 3, 4, 7, 8, 9

Miscellaneous:

American Law Institute Model Penal Code Proposed Official Draft 1962, re Sec. 251.4(4) 17
American Library Association, Newsletter on Intellectual Freedom, Vol. 10, No. 4 (Jan., 1962)—Vol. 12, No. 4 (July 1963) 6
2 Crosskey, Politics and the Constitution 1094-5 (1953) 15
Esquire (Sept., 1961), review, Parker 6
Indianapolis Times (June 14, 1963) 6
Kalven, The Metaphysics of the Law of Obscenity, 1960 Supreme Court Review 1 13

Page

Library Journal (June 18, 1961), review, Moon 5
Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 19, 119 (1960) 17-18
Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 19, 110-14 (1960) 15
Miami News (July, 1963), review, Shaw 5
Miller, Tropic of Cancer (1961) 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16
Milwaukee Journal (June 18, 1961), review, Cross ... 5
Minneapolis Sunday Tribune (June 25, 1961), review, Sherman 6
New York Herald Tribune (June 24, 1961), review, Dolbier 6
New York Post (June 18, 1961), review, Walker 5
New York Times (June 18, 1961), review, Moore 5-6
New York imes (August 27-December 3, 1961) 6
New York Times (Jan. 21, 1962), review, Lewis 6
Orwell, Inside the White Whale and Other Essays 131-146, 176, 184 (1940) 11
San Francisco Examiner (July 14, 1961), review, Gorm 6
Saturday Review (June 24, 1961), review, Redman .. 6
The Nation (Nov. 18, 1961), review, Southern 6
Tucson Arizona Daily Citizen (June 24, 1961), review, Barkman 6
Wallace, Age of Surrealism 184 ff. (1950) 11
Wilson, The Shores of Light 765 ff. (1952) 11

IN THE

Supreme Court of the United States

October Term, 1963

No. .....

GROVE PRESS, INC., a New York corporation, *Petitioner*,

vs.

RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, and WHELAN DRUG CO., INC., a Florida corporation, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District, entered on September 17, 1963, in the above-entitled case.

OPINIONS BELOW

The opinion of the Florida District Court of Appeal (R. 288) is reported at 156 So.2d 537 (Adv) and is printed in Appendix A, *infra*, at page 1a. The earlier opinion of the said appellate court transferring juris-

diction to the Supreme Court of Florida, entered on May 1, 1963, is reported at 152 So.2d 177 and is printed in Appendix A, *infra*, at page 4a; the court order (R. 263) is printed in Appendix A, *infra*, at page 7a. The order of the Florida Supreme Court rejecting jurisdiction and transferring the cause back to the Florida District Court of Appeal, entered on May 30, 1963, (R. 265) is printed in Appendix A, *infra*, at page 8a. The final decree of the trial court (Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County) (R. 283) is printed as Appendix B, *infra*, at page 9a.

JURISDICTION

The final judgment of the Florida District Court of Appeal was entered on September 17, 1963 (R. 288; App. 1a, *infra*). Said court has final appellate jurisdiction of the cause under Article 5 sec. 5(3) of the Florida Constitution. Neither further appeal nor certiorari to the Florida Supreme Court is permitted under Article 5 sec. 4(2) of the Florida Constitution.[1]

---

[1] Petitioner's Assignments of Error to the Florida District Court of Appeal included the unconstitutionality of the Florida obscenity statute (Fla. Stat. 847.011, App. 12a, *infra*) on its face (ground 3) as well as its unconstitutional application to the book in question (grounds 4 and 5) (R. 286). Petitioner later disclaimed and waived any appeal to the said appellate court on the ground of the unconstitutionality of the Florida statute involved, as distinguished from its application to Henry Miller's *Tropic of Cancer*; the parties entered into a stipulation affirming the disclaimer and waiver, which stipulation was recognized and approved by the Florida District Court of Appeal on January 29, 1963 (R. 264, 266, 267). Said appellate court nevertheless transferred the cause to the Florida Supreme Court (152 So.2d 177; R. 263; App. 7a, *infra*). The Florida Supreme Court retransferred the cause back to the appellate court on the ground that the validity of the statute on its

On December 9, 1963, Mr. Justice Black granted an order, on application, extending the time in which to file this petition through December 31, 1963. Jurisdiction of this Court is invoked under Title 28, United States Code, sec. 1257(3), petitioner having asserted in the courts below rights, privileges and immunities conferred by the Constitution and laws of the United States.

QUESTIONS PRESENTED

1. Whether the public distribution of *Tropic of Cancer*, a work having evident social, literary and artistic importance, may be enjoined and suppressed on the basis of a jury finding it "obscene" in a civil proceeding—consistently with the U. S. Constitution's guaranties of free expression, and whether the Constitutional rights of petitioner to publish, and the public to read, this work, were not thereby violated.

2. Whether the literary, artistic or other social importance of a book does not cloak its circulation with Constitutional protection which precludes its suppression as "obscene" under the test in *Roth* v. *United States* 354 U.S. 476.

3. Whether "hard-core" pornography only can be reached by an "obscenity" statute, under the Constitutional guarantees of free expression.

---

face was no longer raised on appeal whereby the Florida Supreme Court had no jurisdiction (R. 265; App. 8a, *infra*). Thus the Florida District Court of Appeal did *not* pass upon the validity of the Florida Statute on its face so as to give the Florida Supreme Court appellate jurisdiction under Article 5, sec. 4(2) of the Florida Constitution. Similarly, as stated by the appellate court in its opinion (156 So.2d 537, 539 Adv; R. 288, 290; App. 3a, *infra*), its decision did not involve "constitutional construction" permitting appeal to the Florida Supreme Court under the same provisions of the Florida Constitution.

4. Whether Florida courts may abridge the freedom of access to a literary work, when the freedom of access to that work is expressly held not subject to abridgment by the courts of other States—consistently with the "freedom of expression" and "privileges and immunities" guarantees of the First and Fourteenth Amendments.

5. Whether the Constitutional guarantees of free expression are not violated by the application of local (Dade County), rather than national, "contemporary community standards" to the question of whether a literary work may be suppressed as "obscene".

6. Whether the courts below violated the Constitutional guarantees of "freedom of expression" and "due process" in failing to exercise their independent judgments and allowing a jury to determine conclusively and as a question of fact that the public circulation of a literary work is not protected by the Constitution but is suppressible as "obscene".

STATUTE INVOLVED

Florida Statute 847.011, Laws of Florida, 1961, c. 61-7, secs. 1-11, prohibits the publication, possession, selling, distribution, etc. of obscene books and other material. As the statute is long, it is reprinted as Appendix C, *infra*, at page 12a. Subsection 10 of the statute defines obscenity as follows:

> "(10) For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

STATEMENT OF THE CASE

On October 16, 1962, petitioner was permanently enjoined by the Circuit Court for Dade County, Florida, from distributing Henry Miller's *Tropic of Cancer*, pursuant to a civil progeeding whose features are described below. Petitioner is the publisher of *Tropic of Cancer* and many other novels, volumes of poetry, plays and works on science, history, criticism, art and music, including the works of established authors such as Herman Melville, Mark Twain, Henry James and D. H. Lawrence, and works by newer authors brought to the attention of the American public by petitioner, including Samuel Beckett, Brendan Behan, Bertold Brecht, Shelagh Delaney, Marguerite Duras, Eugene Ionesco, Harold Pinter, Alain Robbe-Grillet, Jean Genet and William Burroughs. Although Henry Miller had for many years been acclaimed throughout the world as a leading writer of the 20th century, largely on the basis of major works like *Tropic of Cancer*, those works had never been generally available in his native country. With the publication in 1961 of *Tropic of Cancer*, petitioner introduced to the American public the first of those works.[2]

---

[2] Mr. Miller was elected to membership in the American Institute of Arts and Letters in 1958. Among the critics, writers and scholars who have noted the importance of his work have been John Ciardi, Norman Cousins, Lawrence Durrell, T. S. Eliot, Wallace Fowlies, Horace Gregory, Aldous Huxley, George Orwell, Sir Herbert Read, Karl Shapiro, Sir Osbert Sitwell and William Carlos Williams. Reviews of the suppressed book appeared in many newspapers and journals, including, *Miami News* (July, 1963—Fred Shaw) (R. 125-144); *Milwaukee Journal* (June 18, 1961—Leslie Cross), *Library Journal* (June 18, 1961—Erie Moon, ED.), *New York Post* (June 18, 1961—Gerald Walker), *New York Times Book Review* (June 18, 1961—Harry T.

Although in England *Tropic of Cancer* was on account of its literary importance this year ruled freely available for the entire country, by action of the Attorney General there, within the United States some fifty proceedings, or challenges to proceedings designed to suppress *Tropic of Cancer* from bookstores and libraries, have arisen. Many of these controversies still pend in state courts. As the California Supreme Court noted:

> ". . . in some places the book (*Tropic of Cancer*) is 'obscene' and in others it is not; presently its legal status is largely tied into the geography of its sale or publication." (*Zeitlin v. Arnebergh*, 31 Cal. Reptr. 800, 383 P.2d 152, 153 with citations to relevant cases in footnote 1.)[3]

Moore), *New York Herald Tribune* (June 24, 1961—Maurice Dolbier), *Saturday Review* (June 24, 1961—Ben Ray Redman), *Tucson Arizona Daily Citizen* (June 24, 1961—John Barkman), *Minneapolis Sunday Tribune* (June 25, 1961—John K. Sherman), *S. F. Examiner* (July 14, 1961—Lester Gorm), *Esquire* (Sept., 1961—Dorothy Parker) and *The Nation* (Nov. 18, 1961—Terry Southern). The book appeared on the *New York Times* national best seller lists from August 27, 1961 thru December 3, 1961.

[3] See also the incidents of threats, prosecutions and suppression reported in the American Library Association's Newsletter on Intellectual Freedom, Vol. 10, No. 4 (January 1962) through Vol. 12, No. 4 (July 1963). See also *New York Times Book Review* (January 21, 1962) at page 4: "The Most Recent Troubles of Tropic" by Anthony Lewis. There appear to have been 27 arrests in New Jersey alone. Other States include New York, Ohio, Minnesota, Indiana, Illinois, Colorado, Tennessee, Connecticut, Florida, Texas, Kentucky, Pennsylvania, Delaware, Washington, Oklahoma, Alabama, Iowa and Missouri. The most recent conviction occurred in Indianapolis, Indiana where Mr. Keith Cuffel, a divinity school graduate and manager of Curry's College Bookstore was found guilty of selling the book. See *Indianapolis Times* for June 14, 1963.

How the Federal Questions Arose

The federal issues sought to be reviewed arose when the respondent, Richard E. Gerstein, brought suit in the Circuit Court for Dade County seeking an injunction enjoining Whelan Drug Co. from selling and distributing Henry Miller's *Tropic of Cancer* (R. 1). On November 2, 1961, the trial court entered a temporary restraining order enjoining the book's sale, etc. (R. 5). Petitioner moved to intervene as co-defendant (R. 7), and on January 17, 1962, the petition to intervene was granted (R. 9).

Petitioner and Whelan filed their answers to the Complaint denying *inter alia* the obscenity of the book in question and raising the free expression guarantees of the First and Fourteenth Amendments to the Constitution of the United States (R. 10, 12). The trial court submitted the question of obscenity, without Constitutional instructions, to a jury of six Dade County residents who, after reading the book and hearing testimony concerning the book's literary and social importance, but restricted to "local" standards, found the book obscene (R. 13, 17-262; App. 10a, *infra*). On October 16, 1962, the trial court entered its Final Decree, finding that "Tropic of Cancer" was obscene under Fla. Stat. 847.011 and permanently enjoining its publication, dissemination, etc. within the jurisdiction of the court (R. 283; App. 9a, *infra*).

Petitioner timely and properly appealed the trial Court's Final Decree to the Florida District Court of Appeal (R. 282, 286-287, 268-281), and in numbers 4 and 5 of petitioner's Assignments of Error challenged the constitutionality, under the First and Fourteenth Amendments to the Federal Constitution, of the

Court's rulings (R. 286). Petitioner on brief and oral argument urged that the freedom of expression guarantees of the U. S. Constitution protected *Tropic of Cancer* from the action taken. Nevertheless, after the Florida Supreme Court had refused jurisdiction of the cause transferred to it by the Florida District Court of Appeal, petitioner having waived any attack on the constitutionality of Fla. Stat. 847.011 *per se* (see footnote 1, *supra*), the District Court of Appeal entered its opinion on September 17, 1963 affirming the judgment and Final Decree of the trial court banning *Tropic of Cancer* as obscene under the relevant statute. The appellate court's opinion stated *inter alia*: ". . . we consider the jury's decision conclusive on the matter." (R. 288, 290; App. 3a-4a, *infra*)

Petitioner requests this Court to issue a writ of certiorari to review the final judgment of the Florida District Court of Appeal, the highest Florida court which can render a decision in the case at bar, under Title 28, United States Code, sec. 1257 (3) in view of the substantial federal Constitutional questions presented.

REASONS FOR GRANTING THE WRIT

Florida Statute 847.011, for the suppression of "obscenity," is modeled in part after this Court's *Roth* decision. The enforcement of that Statute by the Florida courts below to suppress petitioner's distribution of an important work of literature, Henry Miller's *Tropic of Cancer*, presents several substantial federal questions either not heretofore determined by this Court, or disposed of below in a way not in accord with *Roth*. This Court, in granting the petition for writ of certiorari filed in *Smith* v. *California* 373 U.S.

901, (No. 72, October Term, 1963) and the appeal filed in *Jacobellis* v. *Ohio* 371 U.S. 808, (No. 11, October Term, 1963), recognized the importance of several of the questions raised herein. Finally, the resolution by this Court of one or more of the federal Constitutional questions here presented could serve not only to remove a direct conflict between the decisions of the highest courts of several states on an important federal Constitutional issue (See point 1, *infra*), but also to put an end to uncertain criminal and civil litigation presently pending in a considerable number of state courts (See footnote 3, *supra*).

Among the reasons why this petition should be granted is that the only decision of this Court so far appearing to have squarely faced the Constitutional validity of the enforcement *in rem* of an obscenity statute, unlike the case presented here, involved material making no claim to literary, artistic or other social importance. Nevertheless, this Court there divided 5-4 in upholding the state's suppression of material claimed to be obscene. *Kingsley Books, Inc.* v. *Brown* 354 U.S. 436. The case now before this Court in this aspect presents a federal question of substance not heretofore determined.

A related reason for the issuance of the requested writ is that this Court has not squarely ruled on whether the *Roth* test for identifying "obscenity" may Constitutionally be applied for the suppression not only of worthless matter, but literature or art having social value. This Court's *obiter dicta* in *Roth* strongly suggest that, in subjecting a book such as *Tropic of Cancer* to the "prurient interest" test, as did the courts below pursuant to Florida Statute 847.-011, Federal rights of free expression were violated

and Constitutional questions decided in a way not in accord with this Court's applicable decisions, including *Roth*. And this case touches on the question raised in *Manual Enterprises* v. *Day* 370 U.S. 478 whether "hard-core" pornography, or something less, will satisfy the Constitutional test.

This petition also involves the substantial questions not heretofore decided by this Court (but recently significantly touched on by the Supreme Court of New Jersey; see footnote 6, *infra*), of whether persons residing in one county or state can be made to enjoy a lesser freedom of expression under the Federal Constitution, than persons residing in other counties and states of the Union, and whether national rather than local community standards must apply. The highest courts of three sister states have, in construing similar statutes, effectively granted persons residing therein full right of access to literature and art, and specifically to the book *Tropic of Cancer;* this Court recently declined to review such full right of access with respect to one of those states, California. *Arnebergh* v. *Zeitlin* ... U.S. ... No. 584, October Term, 1963, certiorari denied, Dec. 16, 1963. The same questions were recently answered to the contrary, erroneously, it is submitted, by the highest court of a fourth state. *People* v. *Fritch* 13 N.Y. 2d 119, 192 N.E. 2d 713.

Another important federal question presented by this petition and not heretofore decided by this Court is whether the freedom of a work of literature to circulate publicly may be decided *conclusively* by a jury as an issue of fact, or whether it is not incumbent upon the trial and reviewing courts in such a case to exercise their *independent* judgments and take the

Constitutional issue fully into account as a question of law, or of mixed law and fact.

Each of the reasons and questions here presented, those outlined in the preceding paragraphs, and others discussed hereafter relate to the fundamental rights of free artistic expression and the freedom to read, and each of the questions is of sufficient public importance to merit plenary consideration. If this Court declines to grant the writ herein requested, the people of Florida may be left with a crippled freedom of expression and this nation's liberty with a limp.

1. *Tropic of Cancer* is a work of literature, not a piece of pornography.[4] Although found and held "obscene" after a jury trial in the Florida proceedings below, it has been found and held not obscene *because protected by the Federal Constitution*—in the highest state courts of California, Massachusetts and Wisconsin. *Zeitlin* v. *Arneberg* 31 Cal. Reptr. 800, 383 P. 2d 152, (cert. den. . . . U.S. . . Dec. 16, 1963); *Attorney General* v. *Book Named "Tropic of Cancer"* 184 N.E. 2d 328; *McCauley* v. *Tropic of Cancer* 121 N.W. 2d 545. In each proceeding there has been involved a statute drawn or applied to incorporate this Court's prescription for testing obscenity under *Roth*. These cases thus cannot be squared. Nor can the holding of the Florida courts below be

[4] Or if it is a piece of "pornography", as suggested by a majority of the New York Court of Appeals, then it is a piece to the taste of the greater American audience, over one million of whom have bought the book, and palatable as well to some of this nation's and the world's best respected literary critics. See e.g., Orwell, George, *Inside The Whale and Other Essays* (London 1940) at 131-146, 176, 184; Fowlie, Wallace, *Age of Surrealism* (1950) at 184 ff; Wilson, Edmund, *The Shores of Light* (1952) at 705 ff.

squared with this Court's noteworthy *obiter dictum* in *Roth* v. *United States* 354 U.S. 476, 487, that "The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press."[5] It is perfectly clear from the record in this case that this literature was suppressed solely because of its unconventional portrayals of sex (R. 49-55, 184-186, 211-215, 239-241, 251; App. 2a-3a, *infra*).

Roth was misunderstood and misinterpreted by the courts below so as to countenance a jury's suppressing as "obscene" not worthless matter but a literary work having evident social importance (R. 256-260; App. 2a, 3a-4a, 10a, *infra*). By contrast, the high courts of the three other states cited above have now understood and interpreted *Roth* to require the liberating of such a work from the type of constraint meant to be placed upon worthless "obscenity" or "pornography" by the laws of all States—whenever a work evidences any social worth by its literary or artistic importance.

> "Such an art-form (*Tropic of Cancer*) must be distinguished from that which is designed to excite or attract prurience; it surely does not constitute hard-core pornography . . . a legal proscription cannot, in any event constrict artistic creation." *Zeitlin* v. *Arnebergh*, *supra*, at page 166.

---

[5] The holdings below appear also to be in conflict with this Court's rulings extending from *Times Film Corp.* v. *Chicago* 355 U.S. 35; *Sunshine Book Company* v. *Summerfield* 355 U.S. 372; *Smith* v. *California* 361 U.S. 147, through *Marcus* v. *Search Warrants of Property, etc.* 367 U.S. 717; *Manual Enterprises, Inc.* v. *Day* 370 U.S. 478; *Bantam Books* v. *Sullivan* 372 U.S. 58; and *Smith* v. *California* ... U.S. ... No. 72, October Term, 1963, decided December 16, 1963.

If the *Roth* "prurient interest" test (as refined by *Manual Enterprises*) may, in Florida, like New York, with impunity be applied to suppress classic literature equally with subway scrawls, *Roth* may become a bane to freedom of expression and an overture for this Nation's pressure groups, under the guise of stamping out pornography, to step up rather than leave off their regulation of the Nation's literary and artistic expression.

This case thus presents this Court with both the possibility and need to clarify *Roth's* bearing upon literature, as distinguished from obscenity. *Roth* must have been intended to insure the door barring federal and state intrusion upon freedom of expression was to be left open "only the slightest crack" necessary to permit the policing of *worthless* obscenity. (Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Sup. Ct. Rev. 1). When this crack is pried so wide by courts like those below as to permit the suppression of works having undeniable importance, it would seem incumbent upon this Court to redesign or close the door. It is submitted the case at hand thus raises the very substantial federal question of whether the control of "obscenity" sanctioned by *Roth* can be used as a cover for the general censorship of books, or must be confined as a tool for the elimination of "hard-core" stuff. This Court in *Manual Enterprises* v. *Day*, *supra*, at page 489, noticed the growing pertinence, since *Roth*, of the question "whether 'hard-core' pornography, or something less . . . (is) the proper test. . . ."

As the Supreme Court of California held:

> ". . . if material is commercial obscenity or saleable pornography it is obscenity in the sense that

it is utterly without redeeming social importance; it is hard-core pornography; as such it lies outside the protective embrace of the First Amendment. If the material, however, has literary value, if it is a serious work of literature or art, then it possesses redeeming social importance and obtains the benefit of the Constitutional guarantees." *Zeitlin* v. *Arnebergh*, *supra*, at page 163.

2. The courts below countenanced the exclusion of evidence regarding *Tropic of Cancer's* literary reputation and constitutional status in other state *and* federal jurisdictions, and entirely ignored the bearing of findings on that work by sister state courts, even the highest. They also excluded such evidence of "community standards" as might have been adduced from other works available locally and nationally, and required and allowed the jury to evaluate the work's "obscenity" exclusively on the basis of local, Dade County standards (R. 105-114, 115, 143, 144, 152-156, 159, 160, 201, 218-222, 258; App. 2a, 3a-4a, 10a, *infra*). In so doing, the courts below allowed that freedom of literary and artistic expression could be clipped and pruned as suited each state or local jurisdiction, and subordinated the Constitutional guaranties of free expression to the police powers of counties and states. It is submitted that no right, privilege or immunity enjoyed by the people of the several states, and guaranteed by the Federal Constitution, may thus be randomly defined by local authorities, that petitioner ought to have as large a Constitutional right to furnish access to a book conveying ideas of importance to the people of Florida as to those of California, Wisconsin, and Massachusetts, and that the people of Florida are entitled to just as large a Constitutional right to obtain access to a book conveying ideas of importance as the

people of California, Wisconsin, and Massachusetts. (See 2 Crosskey, *Politics and The Constitution* 1094-5 (1953); Lockhart & McClure, op. cit. *infra* at 110-14).

Some guidance on this point may be afforded by the Supreme Court of New Jersey which recently confronted and decided the question squarely:

> "We are of the opinion that such a standard must necessarily be uniform throughout the nation. . . . In short, the area of expression entitled to constitutional protection cannot be broad in some parts of the country and narrow in others."[6]

The question thus involved, however, has not yet been decided by this Court; only its prompt, correct and authoritative answer will forestall the First Amendment's blanket of freedom of expression becoming a crazy-quilt sewn by myriad local censors' hands.

3. The courts below countenanced a proceeding which reduced the *Roth* test—in the case of an important work of literature—to an exploration by six men of Dade County proclivities towards prurience, shame and morbidity, itchings and longings (R. 255-258; App. 2a, 3a-4a, 10a, *infra*). It is submitted this can be no proper way for courts to measure the claim to freedom of any book, whatever may be its propriety for testing "hard-core" pornography. Aware of the claim to literary and artistic importance of the book,

[6] On December 17, 1963, the Supreme Court of New Jersey reversed criminal obscenity convictions under a New Jersey statute employing "'Roth" language because the lower courts had applied local community standards whereas the only proper standard was "the standard of the contemporary society of this country at large." *State of New Jersey* v. *Hudson County News Co. et al.* (decided December 16, 1963).

the courts below should not have foreclosed themselves from an independent judgment of the book's entitlement to protection under the First and Fourteenth Amendments (App. 2a, 3a-4a, 10a, *infra*). The courts in fact bound themselves by the jury's conclusion not even to consider this Court's warning in *Roth*, that whereas worthless expression may properly be subjected to the "prurient interest" test for the identification of "obscenity," on the other hand every expression of ideas—however hateful, controversial or unorthodox, in literature or art—must be afforded "the full protection of the guaranties."

The holding below, that the jury determination of obscenity was binding upon the Florida trial and appellate courts (App. 3a-4a, *infra*) is inconsistent with the opinion (partial concurrence, partial dissent) of Mr. Justice Harlan in *Roth* v. *United States*, *supra*, the opinion of Mr. Justice Harlan (in which Mr. Justice Stewart joined) in *Manual Enterprises, Inc.* v. *Day*, *supra*, the implicit holdings of this Court in the cases cited in footnote 5, *supra*, and the views of the highest courts of the states of California, Massachusetts, New Jersey, New York and Wisconsin.

Mr. Justice Harlan expressed the principle in the *Roth* case (at 354 U.S. 497, 498):

> ". . . if 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind. . . . the Court . . . (must make) its own independent judgment upon the character of the material. . . ."

Similarly, in the *Manual Enterprises* case Mr. Justice Harlan stated the following (at 370 U.S. 488):

> "That issue (of obscenity), involving factual matters entangled in a constitutional claim, see Grove Press, Inc., v. Christenberry, 276 F.2d 433, 436, is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves."

As stated in *People* v. *Richmond County News, Inc.*, 9 N.Y.2d 578, 175 N.E.2d 681, at 682 (and confirmed in *People v. Fritch, supra*): no court may "escape its responsibility in this area. . . .":

> ". . . if an appellate court were to rely upon and be bound by the opinion of the trier of the facts as to the obscenity of a publication it would be abdicating its role as an arbiter of constitutional issues."

Most recently, the highest court of New Jersey agreed that both the trial and appellate courts:

> "must likewise make an independent determination of whether the attacked material is suppressable within constitutional standards, for the question is not merely one of fact 'but a question of constitutional *judgment* of the most sensitive and delicate kind.' (citing authorities)" *State of New Jersey* v. *Hudson County News Company, et al.* (decided December 16, 1963).

The American Law Institute's Model Penal Code draftsmen also recognized that "the question of obscenity must be left to the independent judgment of courts". Section 251.4 (4) of the *Proposed Official Draft* 1962 provides: "The Court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene."

Finally, as stated, by Lockhart & McClure, supported by their analysis of numerous cases:

"The importance of independent judicial review of obscenity findings for the preservation of freedom of expression is self-evident. The constitutional standards would mean little if their only effective application were by administrators like the Postmaster General, judges, or juries, who are subject to the influence of local pressures and community sentiment stirred up by propaganda groups. Neither professional government censors nor local juries are likely to be sensitive to the basic values of freedom of expression that gave rise to the constitutional standards—values that must enter into applying those standards." *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 19, 119 (1960).

CONCLUSION

For the foregoing reasons, this petition for issuance of a writ of certiorari should be granted and the judgment of the court below reversed.

Respectfully submitted.

EDWARD DE GRAZIA
1001 Connecticut Ave., N.W.
Washington 36, D. C.

RICHARD YALE FEDER
100 Biscayne Blvd. South
Miami 32, Florida

TOBIAS SIMON
c/o Fla. Civil Liberties Union
223 S.E. 1st Street
Miami 32, Florida

Attorneys For Petitioner

IRMA ROBBINS FEDER
LAURENCE I. HEWES, III
Of Counsel

APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
July Term, A.D. 1963

Case No. 62-710

GROVE PRESS, INC., a New York corporation, *Appellant*,

vs.

THE STATE OF FLORIDA, ex rel. RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida, and WHELAN DRUG CO., INC., a Florida corporation, *Appellees*.

Opinion filed September 17, 1963.

An Appeal from the Circuit Court for Dade County, Harold R. Vann, Judge.

Tobias Simon, Irma Robbins Feder, Richard Yale Feder, for appellant.

Richard W. Ervin, Attorney General, and Herbert P. Benn, Assistant Attorney General, Richard E. Gerstein, State Attorney, and Joseph Durant and George Orr, Assistant State Attorneys, for State; Shapiro & Fried, for Whelan Drug Co., appellees.

Before BARKDULL, C.J., and CARROLL and HORTON, JJ.

CARROLL, Judge.

Proceeding under the Florida obscenity statute, Chapter 847, Fla. Stat., F.S.A., the state attorney sought and obtained an injunction with reference to the book "Tropic of Cancer," written by Henry Miller, restraining the defendant dealer and the intervenor, the publisher Grove

Press, Inc., from selling and distributing the book here and from bringing it into this state. The publisher answered denying obscenity and contending the statute violated state and federal constitutional guarantees of due process of law and freedom of speech. The question of the obscenity of the book under the statute was submitted to a jury which found it obscene, prompting the final decree from which the intervenor-publisher appealed.

A holding that the statute was valid made the decision one appealable to the Supreme Court.[1] In assignments of error and its brief, in addition to contending the finding of obscenity was against the weight of the evidence, the appellant challenged the chancellor's ruling on the validity of the statute and contended the statute as applied to the publication was unconstitutional. But prior to argument appellant withdrew its claim of invalidity and unconstitutionality of the statute. This court, being uncertain as to the effect of that action of the appellant upon the appellate jurisdiction of the Supreme Court, transferred the appeal to that court. The Supreme Court ruled against jurisdiction and returned the case. Thereafter, this court considered the appeal on the merits and heard argument. We now affirm the decree.

The book, "Tropic of Cancer" has been judged as to obscenity in a number of jurisdictions with differing results.[2] Generally, those courts have discussed at some

---

[1] The Florida Constitution, Art. V, § 4(2), relating to jurisdiction of the Supreme Court, provides for appeals to the Supreme Court in certain designated instances, including "from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution."

[2] See, e.g., *Zeitlin* v. *Arnebergh* (1963) 31 Cal. Reptr. 800 (and cases cited therein at 801-02, Note 1); *Attorney General* v. *Book Named "Tropic of Cancer"*, 344 Mass. ..., 184 N.E.2d 328; *People* v. *Fritch*, 38 Misc.2d 333, 236 N.Y.S.2d 706; *McCauley* v. *Tropic of Cancer*, Wis. 1963, 121 N.W.2d 545.

length the filth which is packed into the work and in its narration of a procession of sexual episodes. We see no need to so elaborate. The test of obscenity under the Florida statute and the effect of a trial court's finding of obscenity thereunder were stated by this court in Tralins v. Gerstein, Fla. App. 1963, 151 So.2d 19, 20, as follows:

> "• • • The test of obscenity is whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest, that is to say, arouses lascivious or lustful thoughts. Roth v. United States, supra; Rachleff v. Mahon, supra; see also § 847.011, supra. It is for the trier of the facts to determine the contemporary community standards by which obscenity should be measured and, applying these standards and the test set forth above, to determine whether or not a given publication is in fact obscene. Gerstein v. 'Pleasure Was My Business,' Fla. App. 1961, 136 So.2d 8; Rachleff v. Mahon, supra; State v. Clein, Fla. 1957, 93 So.2d 876. An appellate court will not substitute its judgment on these questions for that of the trier of fact absent a compelling reason to do so apparent in the record. See Rachleff v. Mahon, supra."

The record discloses the chancellor approached the decision on a basis which was consistent with the standard previously announced by the Florida courts and with the tests set forth in the Roth and Day cases.[3] For those reasons, and because the question of validity of the statute was waived and the decision found not to involve constitutional construction, we consider the jury's decision con-

---

[3] *Roth* v. *United States* (1957), 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498; *Manual Enterprises* v. *Day* (1962), 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639.

clusive on the matter.[1] The finding of obscenity has not been shown by the appellant to be contrary to the law or to the manifest weight and preponderance of the evidence.

Affirmed.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
January Term, A.D. 1963

Case No. 62-710

GROVE PRESS, INC., *Appellant*,

vs.

STATE OF FLORIDA, ex rel. RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida in and for Dade County, Florida, and WHELAN DRUG CO., INC., a Florida corporation, *Appellees*.

Opinion filed May 1, 1963.

An Appeal from the Circuit Court for Dade County, Harold R. Vann, Judge.

Tobias Simon and Irma Robbins Feder, for appellant.

Richard W. Ervin, Attorney General, and Herbert P. Benn, Assistant Attorney General, for State; Shapiro & Fried, for Whelan Drug Co., appellees.

---

[1] Cases in other jurisdictions for the most part were concerned with the question of obscenity in the legislative and constitutional sense. See cases cited in Note 2, supra.

Before CARROLL, HORTON AND HENDRY, JJ.

PER CURIAM.

After this appeal was briefed this court set the cause for a preliminary argument on jurisdiction.

The suit was brought by the state attorney in Dade County, under chapter 847, Fla. Stat., F.S.A., the Florida obscenity statute, to enjoin sale and distribution of the book, "Tropic of Cancer," authored by Henry Miller and published by the appellant Grove Press, Inc. In a final decree which granted an injunction the chancellor passed directly on the validity of said chapter 847.[1]

Appellant assigned as error the court's ruling with reference to the statute and argued the point in the brief. Thereafter, appellant abandoned and disclaimed the point regarding the statute.[2] Later, the parties to the appeal entered into a stipulation for the same purpose.[3]

---

[1] Regarding the statute, the decree stated:

> "The Court further finds that Chapter 847 F.S. is not unconstitutional nor in violation of the Thirteenth Declaration of Rights of the Florida Constitution nor by the First Amendment to the Constitution of the United States."

[2] The disclaimer provided: "Appellant withdraws and disclaims any ground of the appeal in the above matter dealing with the unconstitutionality of F.S. 847.011, reserving other grounds of appeal raised."

[3] The stipulation contained the following:

> "1. That the appellant's issue presented to the Court relating to the constitutionality of Section 847.011, Florida Statutes, is disclaimed, not alive and is withdrawn from review.
>
> "2. That the issue will not be considered in this cause and is without merit.
>
> "3. That pursuant to and in consideration of the above, the appellee withdraws its motion to strike appellant's disclaimer."

Under Article V, § 4(2) of the Florida Constitution, appeals proceed directly to the Supreme Court in designated instances including "final judgments or decrees directly passing upon the validity of a state statute."

In the case of City of Miami v. Steckloff, Fla. 1959, 111 So.2d 446, in an appeal from such a decree, in which the appellant failed to seek review of "the aspect of the decree passing on the statute," the Supreme Court held the appeal could not be taken directly to that court, and that jurisdiction of the appeal was in the district court. And a decree which passes on validity of a statute may not be adequate to authorize direct appeal to the Supreme Court where the party's challenge of the statute in the trial court was frivolous or not genuine. City of Miami v. Steckloff, supra. The validity of the statute on which the instant case was based had been established recently by the Supreme Court. Tracey v. State, Fla. 1961, 130 So.2d 605.

Here the appellant contended that by withdrawing the point relating to validity of the statute its appeal had been brought within the authority of the Steckloff case, with the result that jurisdiction was properly in the district court. On behalf of the state it was argued that the question of the validity of the statute was inseparable, and was inherent in the appeal.

In the situation presented, it is by no means clear whether jurisdiction of the appeal is in the Supreme Court or is in this court. Therefore, we are providing for transfer of this appeal to the Supreme Court pursuant to a policy which we deem appropriate, that when an appeal lodged here is one as to which our jurisdiction is doubtful and in which there is presented a close question as to whether the jurisdiction is in the Supreme Court or in this court, an order of transfer should be made under rule 2.1 a(5)(d), F.A.R., in order that the Supreme Court as the paramount court may have early and timely opportunity to determine the question of its jurisdiction, to the end

that the appeal may be heard and decided expeditiously in the proper appellate forum.

Whereupon, this court, as authorized and empowered by rule 2.1 a(5)(d), F.A.R., directs that the notice of appeal and all other papers filed prior to May 7, 1963, shall on that date be transferred to the Supreme Court of Florida.

It is so ordered.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT
January Term, A.D. 1963
Tuesday, May 7, 1963

Case No. 62-710

GROVE PRESS, INC., *Appellant*,

vs.

STATE OF FLORIDA, ex rel. RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida in and for Dade County, Florida, and WHELAN DRUG CO., INC., a Florida corporation, *Appellees*.

The court having heretofore given notice that this cause will be transferred to the Supreme Court of Florida as the proper court having jurisdiction of this cause, it is ordered that this cause is, this date, transferred to the Supreme Court of Florida.

A True Copy
ATTEST:

WILLIAM P. CARTER
Clerk District Court of Appeal,
Third District

By LOUIS J. SPALLONE
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA
January Term, A.D. 1963
Friday, May 31, 1963

Case No. 32,733

GROVE PRESS, INC., a New York corporation, *Appellant*,

vs.

THE STATE OF FLORIDA, ex rel. RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida in and for Dade County, Florida, *Appellee*.

This cause coming on this day for consideration, and it appearing that the appellant did not raise, as a question on appeal, the decision of the trial court relating to the validity of the statute in question, and, therefore, the question is not presented for decision on such appeal. See City of Miami vs. Steckloff, 111 So.2d, page 446.

It is, therefore, ordered that this cause be and the same is hereby transferred back to the District Court of Appeal of Florida, Third District, for consideration and determination.

A True Copy

TEST:

GUYTE P. MCCORD
Clerk Supreme Court

APPENDIX B

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE OUNTY

No. 61C 11673

THE STATE OF FLORIDA, ex rel. RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida in and for Dade County, Florida, *Appellee*,

vs.

WHELAN DRUG CO., INC., a Florida corporation, and GROVE PRESS, INC., a New York corporation, *Defendants*.

Final Decree

This cause arises out of the complaint of Richard E. Gerstein, as State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, seeking an injunction against Whelan Drug Co., Inc., a Florida corporation, from the sale and distribution of the book "Tropic of Cancer" written by Henry Miller. Grove Press, Inc., a New York corporation and publisher of the aforesaid "Tropic of Cancer" written by Henry Miller, petitioned this Court to intervene as a co-defendant. This petition was granted. There are no disputed issues of fact except the defendants contend the book "Tropic of Cancer" by Henry Miller is not obscene material in violation of Florida Statutes Chapter 847. The book "Tropic of Cancer" written by Henry Miller was sold, offered for sale and disseminated by the defendant Whelan Drug Co., Inc., a Florida corporation, in Dade County, Florida, as

alleged in the Bill of Complaint. Within the jurisdiction of this Court the defendant did publish the aforesaid "Tropic of Cancer" written by Henry Miller and has voluntarily submitted itself to the jurisdiction of this Court. This Court submitted the question of whether or not the book was obscene as defined by the laws of the State of Florida to a duly constituted jury of six persons. This jury having read the book, having heard testimony offered by the complainants and the defendants, and after argument of counsel returned a special verdict of guilty. That is, that the aforesaid book "Tropic of Cancer" was obscene. Therefore, the Court finds as follows:

1. That the plaintiff, Richard E. Gerstein, is the State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida, and is authorized by the laws of Florida to institute this action.

2. That the defendant, Whelan Drug Co., Inc., a Florida corporation, did sell, offer for sale and disseminate in Dade County the book "Tropic of Cancer" written by Henry Miller, and that the defendant, Grove Press, Inc., a New York corporation, was the publisher of the aforesaid book "Tropic of Cancer" by Henry Miller, and has voluntarily submitted itself to the jurisdiction of this Court.

3. That the said book "Tropic of Cancer" by Henry Miller was obscene in that to the average person applying the contemporary Dade County community standards and taking the dominant theme of the whole book "Tropic of Cancer" by Henry Miller would appeal to the prurient interest of such average reader in Dade County, Florida.

4. That this finding that the said book "Tropic of Cancer" by Henry Miller, which was introduced in evidence without objection, was obscene as determined by a jury of six Dade County residents by a special verdict.

5. The Court further finds that Chapter 847 F.S. is not unconstitutional nor in violation of the Thirteenth Dec-

laration of Rights of the Florida Constitution nor by the First Amendment to the Constitution of the United States.

Wherefore, It Is Ordered and Decreed:

1. That the defendants, Whelan Drug Co., Inc., a Florida corporation, and Grove Press, Inc., a New York corporation, separately and severally be and they are each hereby permanently prohibited and enjoined from printing, publishing, disseminating, selling, lending, giving away, distributing, transmuting, showing, transmitting or offering to sell, lend, give away, distribute, transmit, show or transmute the book "Tropic of Cancer" by Henry Miller or any facsimile or copy of the book "Tropic of Cancer" by Henry Miller within the jurisdiction of this Court.

2. That the defendants, Whelan Drug Co., Inc., a Florida corporation, and Grove Press, Inc., a New York corporation, separately be and they are each thereby permanently prohibited and enjoined from bringing, importing or transporting in or into Dade County, Florida, or exporting from Dade County, Florida, by mail, express company nor private carrier or any means whatsoever, the aforesaid book "Tropic of Cancer" by Henry Miller, or any facsimile or copy thereof.

3. That the Court retains jurisdiction of this cause and the parties in such matters hereof for such other and further proceedings as may be required by law or equity.

Done and ordered in the Courthouse at Miami, Dade County, Florida, this 16th day of October, 1962.

Harold R. Vann
Circuit Judge
Eleventh Judicial Circuit of
Florida, in and for Dade County.

APPENDIX C

FLA. STAT. 847.011 Prohibition of certain acts in connection with obscene, lewd, etc., materials, penalty (1)(a) A person who knowlingly sells, lends, gives away, distributes, transmits, shows or transmutes, or offers to sell, lend, give away, distribute, transmit, show or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner knowingly hires, employes, uses, or permits any person to do or assist in doing, either knowingly or innocently, any act or thing mentioned above, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding $1,000.00, or both. A person who, after hav-

ing been convicted of a violation of this section, thereafter violates any of its provisions, is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,000.00, or by both such fine and imprisonment.

(b) The knowing possession by any person of six or more identical or similar materials, matters, articles, or things coming within the provisions of the foregoing paragraph (a) is presumptive evidence of the violation of said paragraph.

(2) A person who knowingly has in his possession, custody or control any obscene lewd lascivious filthy indecent immoral sadistic or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise the same, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding six months or by fine not exceeding $500.00, or both. In any prosecution for such possession, it shall not be necessary to allege or prove the absence of such intent.

(3) No person shall as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, or publication require that the purchaser or consignee receive for resale any other article,

paper, magazine, book, periodical, or publication reasonably believed by the purchaser or consignee to be obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic, and no person shall deny or threaten to deny or revoke any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure of any person to accept any such article, paper, magazine, book, periodical, or publication, or by reason of the return thereof. Whoever violates this section is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,000.00, or by both such fine and imprisonment.

(4) Every act, thing, or transaction forbidden by this section shall constitute a separate offense and shall be punishable as such.

(5) Proof that a defendant knowingly committed any act or engaged in any conduct referred to in this section may be made by showing that at the time such act was committed or conduct engaged in he had actual knowledge of the contents or character of the material, matter, article, or thing possessed or otherwise dealt with, or by showing facts and circumstances from which it may fairly be inferred that he had such knowledge, or by showing that he had knowledge of such facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such contents or character.

(6) There shall be no right of property in any of the materials, matters, articles, or things possessed or otherwise dealt with in violation of this section, and upon the seizure of any such material, matter, article, or thing by any authorized law enforcement officer the same shall be delivered to and held by the clerk of the court having jurisdiction to try such violation. When the same is no longer required as evidence, the prosecuting officer or any claim-

ant may move the court in writing for the disposition of the same and after notice and hearing, the court, if it finds the same to have been possessed or otherwise dealt with in violation of this section, shall order the sheriff to destroy the same in the presence of the clerk; otherwise, the court shall order the same returned to the claimant if he shows that he is entitled to possession. If destruction is ordered, the sheriff and clerk shall file a certificate of compliance.

(7) (a) The circuit court has jurisdiction to enjoin a threatened violation of this section upon complaint filed by the state attorney, county solicitor, or county prosecuting attorney in the name of the state upon the relation of such state attorney, county solicitor, or county prosecuting attorney.

(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining the person complained of until final hearing or further order of the court. Whenever the relator state attorney, county solicitor or county prosecuting attorney shall request a judge of said court to set a hearing upon an application for such a restraining order, such judge shall set such hearing for a time within three days after the making of such request. No such order shall be made unless such judge shall be satisfied that sufficient notice of the application therefore has been given to the party restrained of the time when and place where the application for such restraining order is to be made, provided, however, that such notice shall be dispensed with when it is manifest to such judge, from the sworn allegations of the complaint or the affidavit of the plaintiff or other competent person, that the apprehended violation will be committed if an immediate remedy is not afforded.

(c) The person sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue

and a decision shall be rendered by the court within two days of the conclusion of the trial.

(d) In the event that a final decree of injunction is entered, it shall contain a provision directing the defendant having the possession, custody, or control of the materials, matters, articles, or things affected by the injunction to surrender the same to the sheriff and requiring the sheriff to seize and destroy the same. The sheriff shall file a certificate of his compliance.

(e) In any action brought as provided in this section, no bond or undertaking shall be required of the state or the state attorney or county solicitor or county prosecuting attorney before the issuance of a restraining order provided for by paragraph (b) of this subsection, and there shall be no liability on the part of the state or the state attorney or the county solicitor or the county prosecuting attorney for costs or for damages sustained by reason of such restraining order in any case where a final decree is readered in favor of the person sought to be enjoined.

(f) Every person who has possession, custody, or control of, or otherwise deals with any of the materials, matters, articles, or things described in this section, after the service upon him of a summons and complaint in an action for injunction brought under this section, is chargeable with knowledge of the contents and character thereof.

(8) The several sheriffs, constables, state attorneys, county solicitors, and county prosecuting attorneys shall vigorously enforce this section within their respective jurisdictions.

(9) This section shall not apply to the exhibition of motion picture films permitted by § 521.02.

(10) For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community stand-

ards, the dominant theme of the material taken as a whole appeals to prurient interest.

(11) For the purposes of this section, the word person includes individuals, firms, associations, corporations, and all other groups and combinations. Laws 1961, c. 61-7, §§ 1-11.